Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-806

In the Supreme Court of the United States

OCTOBER TERM, 1975

BLAINE M. MADDEN, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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We invite the Court's attention to the following facts which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on April 9, 1975 (Pet. App. B-1). No extension of time for petitioning was obtained, and the 90-day period in 28 U.S.C. 2101(c) for petitioning in civil cases expired on July 8, 1975. However, the petition was not filed until December 5, 1975. Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, it is respectfully

submitted that the petition for a writ of certiorari should be denied.[1]

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[1]Petitioners assert (Pet. 2) that after the court of appeals rendered its decision, they made an "immediate request for re-hearing" before the court of appeals, and that the "Petition for rehearing was denied" on September 5, 1975. In fact, the only post-judgment documents filed in the court of appeals, and acted on by that court, was a motion for leave to file a petition for rehearing out of time which was denied on September 5, 1975. See Appendix, *infra*. "The filing of an untimely petition for rehearing which is not entertained or considered on the merits, or a motion for leave to file such a petition out of time, if * * * denied by the trial court, cannot operate to extend the time for appeal" (*Bowman* v. *Loperena*, 311 U.S. 262, 266; footnote omitted). In any event, even if petitioners' time did run from September 5, 1975, the 90-day period would have expired on December 4, 1975, one day before the petition was filed.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLAINE M. AND VIRGINIA C. MADDEN,

APPELLEES,

v.

COMMISSIONER OF INTERNAL REVENUE,

APPELLANT.

No. 72-2536

ORDER

FILED SEPTEMBER 5, 1975

Before: CHOY and GOODWIN, Circuit Judges, and BURNS, District Judge.*

The court having considered the matter, appellees' motion to file a late petition for rehearing is Denied.

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.